STATE OF MICHIGAN

COURT OF APPEALS

BRADLEY DUNN, Plaintiff-Appellee, v DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE, Defendant-Appellant.	FOR PUBLICATION December 3, 2002 9:25 a.m. No. 230793 Oakland Circuit Court LC No. 99-019878-NF Updated Copy February 14, 2003

Before: Fitzgerald, P.J., and Bandstra and Gage, JJ.

FITZGERALD, P.J. (*dissenting.*)

I respectfully dissent from the majority's conclusion that the trial court erred by ordering defendant no-fault insurer to pay plaintiff the amount plaintiff was required to reimburse the employer-funded ERISA plan for medical benefits paid for injuries caused by the April 1997 car accident.

Even though our Supreme Court reversed this Court's opinion in *Yerkovich, v AAA*, 231 Mich App 54; 585 NW2d 318 (1998), without specifically addressing the issue relevant to this appeal, this Court's analysis in *Yerkovich* is not binding precedent under MCR 7.215(I)(1). *Taylor v Kurapati*, 236 Mich App 315, 345-346, n 42; 600 NW2d 670 (1999). However, the relevant analysis in *Yerkovich* has not been overruled. While not binding, *Yerkovich* remains valid persuasive authority on the issue. I would conclude that the trial court did not err by ordering that defendant no-fault insurer pay plaintiff the amount he was required to reimburse the employer-funded ERISA plan for medical benefits paid for injuries caused by the April 1997 car accident.

A no-fault insurer cannot seek reimbursement for medical benefits paid from an insured's third-party tort recovery except under the limited circumstances set forth in § 3116 of the no-fault act, MCL 500.3116. *Great Lakes American Life Ins Co v Citizens Ins Co*, 191 Mich App 589, 596-597; 479 NW2d 20 (1991). Subsection 3116(4) expressly bars "subtraction or reimbursement" from a recovery "realized for noneconomic loss." *Id.*

In *Sibley v DAIIE*, 431 Mich 164; 427 NW2d 528 (1988), our Supreme Court found that worker's compensation benefits a plaintiff received, which were later required to be reimbursed from the proceeds of a tort settlement, were not government-provided benefits subject to

coordination under subsection 3109(1) of the no-fault act, MCL 500.3109(1). In *Sibley*, the Court explained:

> We are persuaded that when the automobile no-fault act speaks of benefits "provided," it means benefits permanently provided. *To the extent that benefits are retrieved by the alternative source provider out of the worker's tort recovery, they at that point cease to be "benefits provided" within the meaning of § 3019(1) relieving the automobile no-fault insurer of liability to the extent of "benefits provided" by alternative sources* pursuant to state or federal law.
>
> Because plaintiff was ultimately required to refund the FECA benefits he had received, he was left without that compensation for his medical services and lost wages. Therefore, his only recourse for economic damages was to seek payment from his no-fault carrier. Because, in fact, only single recovery was available to plaintiff, there was no duplicative recovery. [*Id.* at 170-171 (emphasis added).]

In *Yerkovich, supra* at 63-68, this Court held that where an ERISA-type plan is entitled to reimbursement of medical benefits paid from a tort settlement, the insured's no-fault insurer is responsible for the payment of those medical benefits. Citing *Great Lakes*, the Court found that it was "appropriate to use the approach set forth in *Sibley* and allow the plaintiff to look to her no-fault carrier to make her whole." *Yerkovich, supra* at 68.

There is no dispute that plaintiff sued a third-party tortfeasor for noneconomic damages arising from his April 1997 car accident and received a monetary settlement in that case. The health plan, which paid $96,152.65 in medical benefits for plaintiff's injuries arising from that accident, sought and obtained reimbursement for its payments out of the settlement funds. Plaintiff had to pay his health insurer out of his recovery for noneconomic damages and so has effectively paid his own medical expenses. Under *Sibley*, to the extent that plaintiff reimbursed the employer plan for those medical benefits, those benefits went unpaid and cannot be considered paid by an alternative source or provider under the coordination of benefits clause contained in defendant's no-fault policy. Defendant no-fault insurer has no contractual right to "coordinate" against benefit payments that were effectively revoked by the primary insurer and paid by the insured. Nor should defendant be able to indirectly coordinate medical benefit payments against plaintiff's tort recovery for noneconomic loss. MCL 500.3116(4); *Great Lakes, supra*.

I would affirm.

/s/ E. Thomas Fitzgerald